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No.

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IN THE

Supreme Court of the United States

October Term, 1994

NELSON GANDARILLAS-ZAMBRANA,
Petitioner,

v.

BOARD OF IMMIGRATION APPEALS,
U.S. IMMIGRATION & NATURALIZATION SERVICE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the INS violates the Due Process Clause of the Fifth Amendment by the arbitrary change of venue for a deportation hearing to a location where the alien has no contacts and little opportunity to obtain counsel and present evidence.

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NELSON GANDARILLAS-ZAMBRANA,
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BOARD OF IMMIGRATION APPEALS,
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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Nelson Gandarillas-Zambrana respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

Nelson Gandarillas-Zambrana v. Board of Immigration Appeals, No. 94-1248, 4th Cir., Jan. 20, 1995, reported at 44 F.3d 1251.

In Re: Nelson Gandarillas-Zambrana, A35 381 803, decision of the Immigration Judge, October 25, 1993; Decision of Board of Immigration Appeals, Jan. 6, 1994, both unreported.

JURISDICTION

The judgment of Court of Appeals for the Fourth Circuit was entered on January 20, 1995.

The Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

United States Constitution:

Fifth Amendment: "No person shall be . . . deprived of life, liberty, or property, without due process of law."

Statutes:

Immigration and Nationality Act,

8 U.S.C. § 1251(a)(2)(A)(ii):

"Any alien who at any time after entry is convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial, is deportable."

8 U.S.C. § 1252(c):

"The Attorney General is hereby authorized and directed to arrange for appropriate places of detention for those aliens whom he shall take into custody and detain under this section."

8 U.S.C. §1362:

"In any exclusion or deportation proceedings before a special inquiry officer and in any appeal proceedings before the Attorney General from any such exclusion or deportation proceedings, the person concerned shall have the privilege of be-

ing represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose."

STATEMENT OF THE CASE

A deportation hearing was held in Oakdale, Louisiana, on December 8, 1993. The Immigration Judge denied petitioner's application for waiver of inadmissibility under section 212(c) of the Immigration and Nationality Act. An appeal was taken to the Board of Immigration Appeals (hereinafter BIA). On January 6, 1994, the BIA issued a decision and ordered petitioner deported from the United States to Bolivia.

A petition for Review was filed with the United States Court of Appeals for the Fourth Circuit. On January 20, 1995, the Court of Appeals affirmed the order of deportation. Federal jurisdiction was in the Court of Appeal pursuant to 8 U.S.C. § 1105a(a)(1), which authorizes review of final orders of the BIA.

Petitioner, Nelson Gandarillas-Zambrana, is a citizen of Bolivia. He entered the United States as a legal permanent resident in 1981 at the age of fifteen. He has lived in the United States ever since, doing construction work and working as a private security officer.

Petitioner has no relatives in Bolivia. His four brothers, two sisters and invalid mother reside in America. He contributed $8,000 to the down payment on a house in Virginia that he owns with his mother and siblings. He also has contributed to mortgage payments.

An Order to Show Cause and Notice of Hearing dated March 29, 1993 was served on petitioner in Virginia. (Appendix D) This document commenced deportation proceedings against

petitioner under 8 U.S.C. § 1251(a)(2)(A)(ii) which makes an alien subject to deportation for committing two crimes involving moral turpitude. Specifically, the crimes stated in the Order were both petit larceny. The venue of the hearing was set for Arlington, Virginia at a date to be determined. However, when petitioner was unable to post bond he was transferred to the INS Federal Detention Center in Oakdale, Louisiana.

These and several other misdemeanors were related to an alcohol problem. However, petitioner completed an alcohol treatment program, and he had abstained from alcohol during the year prior to his deportation hearing. The immigration judge concluded that the positive factors weighing in petitioner's favor were outweighed by his misdemeanors and history of alcohol abuse, (Appendix C) and exercised his discretion in favor of denying petitioner's application for waiver of deportation. The BIA and Court of Appeals affirmed.

In the Court of Appeals petitioner contended, *inter alia,* that by holding the deportation hearing at a place over 1,000 miles from his residence and family, his right to counsel and to present witnesses violated his due process rights. The circuit court concluded that the INS had authority to change venue pursuant to 8 U.S.C. § 1252(c) and that petitioner had not been denied his statutory right to counsel. These are the issues presented to this Court.

REASONS FOR GRANTING THE PETITION

A proper development of immigration law with respect to venue of hearings and right to counsel requires that the Court answer the question posed by this case.

I. THE CHANGE IN VENUE TO A REMOTE LOCATION VIOLATED PETITIONER'S DUE PROCESS RIGHTS UNDER THE FIFTH AMENDMENT.

"Aliens, even aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the Fifth . . . Amendment." *Plyler v. Doe*, 457 U.S. 202, 210 (1982). *Mathews v. Diaz*, 426 U.S. 67 (1976); *The Japanese Immigrant Case*, 189 U.S. 86 (1903). In *Bridges v. Wixon*, 326 U.S. 136, 154 (1945), the Court said:

> "We are dealing here with procedural requirements prescribed for the protection of the alien. Though deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. That deportation is a penalty — at times a most serious one — cannot be doubted. Meticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness."

Supreme Court cases have frequently suggested that a continuously present resident alien is entitled to a fair hearing when threatened with deportation. *United States ex rel. Tisi v. Tod*, 264 U.S. 131, 133, 134 (1924); *Low Wah Suey v. Backus*, 225 U.S. 460, 468 (1912). In *Landon v. Plasencia*, 459 U.S. 21, 33 (1982), the Court noted that it had "developed the rule that a continuously present permanent resident alien has a right to due process in such a situation," citing *United States ex rel. Vajtauer v. Commissioner of Immigration*, 273 U.S. 103, 106 (1927); *The Japanese Immigrant Case, supra* at 100-101.

After initially setting the hearing for Arlington, Virginia, the INS transferred petitioner over 1,000 miles from his home in

northern Virginia to Oakdale, Louisiana, which has a population of 6,837.[1] The nearest large city is Alexandria, forty miles away, which has a population of 49,049. The next largest city is Lafayette, sixty miles away with a population of 94,438. This change of venue was pursuant to a policy which some courts have found violative of the due process rights of the alien. See, *e.g., Rios-Berrios v. INS,* 776 F.2d 859 (9th Cir. 1985) and *Louis v. Meissner,* 530 F.Supp. 924 (S.D. Fla. 1981). In these cases the change of venue was held to violate the alien's right to counsel. The prejudice to petitioner resulting from this change of venue lies in the fact that he was isolated in a remote town far from friends and family who might help or advise him.

There is no clear mandate in either the statute or regulations as to where a hearing should be held. The court in *La Franca v. INS,* 413 F.2d 686 (2nd Cir. 1969) noted that:

> "Ordinarily the better procedure would be to hold the hearing in the district of the alien's residence or place of arrest. Obviously it should not be held in a district so far removed from his residence or place of arrest as to deprive him of a fair hearing." *Id.* at 689.

Yet neither of those factors are present in the present case. Further, no evidence or possible witnesses for either party were located in or near Oakdale, Louisiana. No logical nexus exists between the petitioner and Oakdale. Under these circumstances it is submitted that the change of venue deprived petitioner of his constitutional right to a fair hearing.

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[1]Population statistics are from the 1990 census and are contained in *The World Almanac,* 1995; distances are from *The New York Times Atlas of the World,* 1988.

II. THE IMPROPER CHANGE IN VENUE EFFECTIVELY DEPRIVED PETITIONER OF HIS STATUTORY RIGHT TO COUNSEL

No right to counsel under the Sixth Amendment is recognized in deportation proceedings. However, Congress saw a dictate of humanity and enacted a statute, 8 U.S.C. § 1362, which provides in mandatory language that in any deportation proceedings and in any appeal proceedings the person concerned "shall have the privilege of being represented (at no expense to the government) by such counsel, authorized to practice in such proceedings, as he shall choose." The legislative history of this provision confirms that Congress wanted to confer a *right*. See H.R. Rep. No. 1365, 82d Cong., 2d Sess. 57, reprinted in 1952 U.S. Code Cong. & Admin. News 1653, 1712. The Ninth Circuit concluded: "Failure to accord an alien this right may, in the light of the entire administrative record, be an abuse of discretion, requiring remand. *Castro-Nuno v. INS*, 577 F.2d 577, 578-79 (9th Cir. 1978); *Castro-O'Ryan v. Dept. of Imm. & Naturalization*, 847 F.2d 1307, 1312 (9th Cir. 1988).

The change of venue to a remote location makes it difficult or impossible for an alien to obtain counsel. In *Rios-Berrios, supra*, the court held that the INS violated a Salvadoran's statutory right to counsel. Rios-Berrios, a citizen of El Salvador, was arrested in California, and the INS transfered him to a detention camp in Miami, Florida. The immigration court granted Rios-Berrios two continuances to locate an attorney. When he appeared at the next hearing without counsel, the court commenced deportation proceedings. The immigration court denied the application for asylum and entered a deportation order; the BIA affirmed.

The Ninth Circuit vacated the deportaion order and remanded for new proceedings. Although recognizing that under

8 U.S.C. § 1252(c), the INS had discretion to transfer aliens to detention camps away from the place of arrest, the court held that the transfer "demanded more than lip service to the right of counsel declared in statute and agency regulations, a right obviously intended for the benefit of aliens in petitioner's position." *Id.* at 863. In so holding, the court stated: "We are not in favor of an agency treating the statutes and regulations by which it is governed as casually as it viewed them here. We will continue to take a close look at a claim . . . where so fundamental a question as right to counsel of one's choice is concerned." *Id.* at 863-64 (citations omitted).

Consistent with *Rios-Berrios*, other courts have refused to defer to the INS' discretion to transfer aliens when it was exercised in a way that denied aliens their right to counsel. For example, in *Louis v. Meissner, supra*, the court enjoined the INS from commencing or continuing immigration proceedings or deporting Haitians who had been transferred by the INS from Miami to detention camps in other states. The court reasoned that "from this relatively advantageous location (Miami) from the perspective of the refugees, INS has distributed them to remote areas lacking attorneys with experience in immigration law, or for that matter, any attorneys at all willing to represent them." *Id.* at 926. Given these facts, the court concluded that the INS thwarted the statutory and regulatory rights of those refugees to representation. See also *Chlomos v. INS*, 516 F.2d 310 (3d Cir. 1975) which held that the immigration court's refusal to grant a change of venue to an alien who was detained in Miami, but whose counsel was located in New York, and setting an immediate hearing without reasonable notice to counsel, denied the alien his right to counsel.

The present case involves a resident alien who was transferred from Virginia to Oakdale, Louisiana, over 1,000 miles from

his family, friends and employer who could assist him in obtaining an attorney and witensses to present a defense. Although petitioner was given a list of attorneys, he was not able to obtain counsel. At the start of the hearing petitioner "waived" his right to counsel. It is submitted that the waiver was not "knowingly" made. To be valid the petitioner's waiver must have been "an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) This principle has expressly been made applicable to immigration proceedings. "[M]eticulous care must be exercised to insure that a waiver of this right is competently and understandingly made." *Matter of Guttierez*, 16 I & N Dec. 2587 at 228 (BIA 1977). The purpose of the regulation is to assure that any waiver of counsel is made knowingly and intelligently.

In the present case the fact that petitioner said that he would proceed without counsel cannot be an intelligent waiver of a known right. This is shown by the fact that he made no attempt to present a defense at the hearing. The only mitigating evidence presented in petitioner's defense consisted of his answers to questions by the immigration judge and the INS attorney. This situation is aggravated by the fact that the INS transferred petitioner to a small town over 1,000 miles from his home. He could not consult personally with family and friends concerning the possibility of retaining counsel or present witnesses at the hearing because of the distance involved.

Petitioner was undoubtedly intimidated by the formal hearing and lacked knowledge of our legal sysem. Thus he did not put evidence of his unsuccessful search for counsel in the record. Furthermore, he did not voice objections or place relevant evidence of his rehabiliation in the record. An attorney could have presented evidence of rehabilitation from petitioner's family, friends and employer. Thus there was prejudice to petitioner due to lack of counsel.

In examining whether an alien's right to counsel has been interferred with, courts also consider the need for and availability of community legal services. *Castaneda-Delgado v. INS*, 525 F.2d 1295 (7th Cir. 1975). Therefore, to transfer petitioner to a city where it was extremely difficult, if not impossible, to exercise his statutory right to counsel, violated his constitutional right to a fair hearing.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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April 1995

APPENDIX A

PUBLISHED

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 94-1248

NELSON GANDARILLAS-ZAMBRANA,
a/k/a Oscar Jr. Gandarillas, a/k/a Nalson Gandarillos,
Petitioner,

v.

BOARD OF IMMIGRATION APPEALS,
Respondent.

On Petition for Review of an Order
of the Immigration and Natualization Service.
(A35-381-803)

Argued: November 3, 1994

Decided: January 20, 1995

Before ERVIN, Chief Judge, WIDENER, Circuit Judge, and PHILLIS, Senior Circuit Judge.

Affirmed by published opinion. Senior Judge Phillips wrote the opinion, in which Chief Judge Ervin and Judge Widener joined.

COUNSEL

ARGUED: Donald Louis Schlemmer, Washington, D.C., for Petitioner. Teresa Ann Wallbaum, UNITED STATES DE-

PARTMENT OF JUSTICE, Washington, D.C., for Respondent. **ON BRIEF:** Claudia J. Zucker, Washington, D.C., for Petitioner. Frank W. Hunger, Assistant Attorney General, David J. Kline, Assistant Director, Office of Immigration Litiation, Civil Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Respondent.

OPINION

PHILLIPS, Senior Circuit Judge:

Petitioner Nelson Gandarillas-Zambrana, a Bolivian national who has been ordered deported, appeals an order of the Board of Immigration Appeals ("BIA") denying his application for a discretionary waiver of deportation under section 212(c) of the Immigration and Nationality Act ("INA"), as amended 8 U.S.C. § 1182(c). Finding no abuse of discretion, we affirm the decision of the BIA.

I.

Gandarillas is a native of Bolivia. He immigrated to the United States in 1981. While living in this country, Gandarillas has been convicted of a series of misdemeanor crimes in three states and the District of Columbia during the years between 1984 and 1992. Among these were two convictions in Virginia for petit larceny, one in 1988 and one in 1991, which became the basis for an Order to Show Cause why he should not be deported, issued by the Immigration and Naturalization Service ("INS") in 1993.

Pursuant to the Show Cause order, Gandarillas appeared before an Immigration Judge ("IJ") in Oakdale, Louisiana. At this hearing, the IJ asked him if he could understand English,

to which Gandarillas responded "yes." The IJ told Gandarillas to notify him if he could not understand something that was said in English. The IJ also notified him of his right to counsel, ensured that he had been given a list of free and inexpensive legal services, and postponed the hearing to allow him time to obtain counsel. Nevertheless, when the hearing resumed, Gandarillas appeared without counsel and, after being asked if he needed more time to find a lawyer, stated, "No. I would li — like to speak in my own behalf." AR at 143.

At the hearing, Gandarillas admitted the larceny convictions, thereby conceding deportability. He then applied for relief from deportation under section 212(c). At the relief hearing, the IJ confirmed that Gandarillas could understand English. Once again, Gandarillas appeared without counsel.

At this hearing, Gandarillas testified to the following facts. He is a citizen of Bolivia. He entered the United States as a legal permanent resident on September 14, 1981, at the age of 15 years. He has lived in the United States ever since, except for ten months during 1986 when he served in the Bolivian army. He worked for a construction company from 1985 to 1986, and after returning from his military service in Bolivia, he worked for another construction company until 1991. He began work as a private security officer in 1991, and has also worked with his brothers doing construction work. He has not served in the American military.

Gandarillas has no relatives in Bolivia. His four brothers, two sisters, and his mother reside in America. His father is dead, and he is single with no children. No one living in America is financially dependant on him; his mother was disabled by a back injury, but his siblings are available to support her. He contributed $8,000 to the down payment on the $175,000 house in Virginia that he owns with his mother and siblings; he contributed to the mortgage except while in jail for petit

larceny. His mother lives in that house with three of his siblings.

Besides the two petit larceny convictions, Gandarillas's criminal record includes convictions for failure to identify himself to police, possession of a concealed weapon (twice), assault against a police officer, destruction of property, assault (three times), theft, attempted theft (twice), harassment, and obstructing and hindering police. All of these were misdemeanors; many occurred in violation of probation. In addition, he was arrested for making terroristic threats and disorderly conduct, but fled the state before being tried. He has also been arrested for numerous other offenses including possession of marijuana, abduction, and conspiracy to commit burglary, but these charges were "nolle prossed" or dismissed in return for guilty pleas to other charges.

He was under the influence of alcohol at the time of many of his offenses, and admits to a drinking problem. He was expelled after one month of a three-month alcohol treatment program, but later completed a similar program while incarcerated. He claimed not to have drunk any alcohol during the year prior to his deportation hearing. He believes that remaining sober will be a challenge for him for the rest of his life. He hopes to return to school to earn a high school diploma, to find a job, and to return home to live with his mother. He testified that he believes that the Bolivian economy is poor but presented no proof. He expressed concern that his job prospects in Bolivia are slim, but admits that he can speak Spanish, the national language. Finally, Gandarillas submitted documents to support his claim of rehabilitation, including letters from family members, his employer, a member of a non -profit dance troupe to which he belonged, and a Georgetown law student regarding Gandarillas's participation in the D.C. Street Law program. The IJ found that the tenor of these was generally pleading for a second chance for Gandarillas rather than testify-

ing to his complete rehabilitation. He also submitted certificates of completion from an alcohol rehabilitation program and a vocational program.

The IJ considered the evidence and balanced the positive factors weighing in Gandarillas's favor against the negative factors evidencing his undesirability as a permanent resident. The IJ found that Gandarillas's "total criminal history . . . [is] a serious adverse factor in the exercise of [the IJ's] discretion which may be overcome, if at all, only by a showing of outstanding or unusual equities," and that the "positive equities displayed by [Gandarillas] do no rise to the level of outstanding or unsusual so as to outweigh the serious adverse factors of his long criminal record and long history of alcohol abuse." AR at 25-26. Consequently, the IJ exercised his discretion in favor of denying his application for waiver of deportation. The BIA affirmed, adopting without restating the IJ's reasoning. Gandarillas petitions this Court for review.

II.

This Court has jurisdiction under 8 U.S.C. § 1105a to review only "final orders of deportation" entered after exhaustion of all administrative remedies. *Huaman-Cornelio v. BIA*, 979 F.2d 995, 999 (4th Cir. 1992). Because the BIA is the highest administrative tribunal, we usually review only its findings and final order, rather than those of the IJ. *Id.* However, here the BIA adopted the findings and reasoning of the IJ in a one-paragraph per curiam opinion. We hereby adopt the rule of the Tenth Circuit and hold that if the BIA "chooses to rely on the express reasoning of the [IJ] . . . , that reasoning will be the sole basis for our review, and if we find that reasoning inadequate, we will . . . reverse the holding of the [IJ]." *Panrit v. INS*, 19 F.3d 544, 546 (10th Cir. 1994). The decision whether to grant a waiver of deportation is committed to the

sound discretion of the Attorney General or her delegate (here, the IJ), and we review that decision for abuse of discretion. *Casalena v. INS*, 984 F.2d 105, 106 (4th Cir. 1993).

Gandarillas actually seeks by his petition for review to challenge the agency decision on two levels. First, that in various respects the proceedings leading to that decision violated his constitutional due process rights. Second, that the decision itself involved an abuse of agency discretion by failing properly to weigh the relevant factors.

We will take these in order.

III.

Gandarillas contends that the agency proceedings violated his rights to procedural due process in four ways: (1) by holding the waiver of deportation hearing at a place so distant from his place of residence that his right to counsel and to present witnesses was prejudiced; (2) by the IJ's failure to act impartially in the course of questioning him at the hearing; (3) by not providing him with a Spanish translator; and (4) by having him appear at the hearing in prisoner's clothing. He claims that these violations so prejudiced his rights to a fundamentally fair hearing that a new proceeding free of their prejudicial effects should be ordered.

At the outset, the INS contends that because these constitutional claims were not raised before the BIA, Gandarillas have waived them. Although a failure to raise claims before the BIA does ordinarily constitute a waiver that precludes their consideration on judicial review, *Farrokhi v. INS*, 900 F.2d 697, 700-01 (4th Cir. 1990), Gandarillas urges us to recognize an exception to this general rule for denial of due process claims, as he contends the Ninth Circuit did in *Vargas v. Department of Immigration*, 831 F.2d 906, 908 (9th Cir. 1987).

As we did in *Farrokhi*, we can avoid deciding here whether such an exception should be recognized and, if so, its scope, because here, as in *Farrokhi* the claims are demonstrably without merit. *Farrokhi*, 900 F.2d at 701. While an alien is of course entitled to the constitutional protections of due process in deportation proceedings, *The Japanese Immigrant*, 189 U.S. 86, 100-01 (1903), the alleged violations here do not rise even to the level of abuse of administrative or judicial discretion, not to say to the level of constitutional defects. In all the respects challenged, the proceedings were conducted in accordance with governing statutes and regulations which are not themselves challenged as unconstitutional.

First, holding the hearing in Louisiana violated no statutory or constitutional right. It was held in Oakdale, Louisiana because Gandarillas had been transferred to the permanent INS Federal Detention Center in that location from the temporary INS detention center in Arlington, Virginia after he failed to post bond. The INS necessarily has the authority to determine the location of detention of an alien in deportation proceedings, INA § 242(c), 8 U.S.C. § 1252(c), and therefore, to transfer aliens from one detention center to another. *Sasso v. Milhollan*, 735 F. Supp. 1045, 1048 (S.D. Fla. 1990). The INA guaranteed Gandarillas the same rights and privileges at a deportation proceeding in Louisiana as it would elsewhere. *Id.* at 1049. Accordingly, there is nothing inherently irregular, not to say unconstitutional, about the transfer from Virginia to Louisiana. Finally, viewed as a matter of venue, it must be noted that Gandarillas never moved for a change[1] but indicated his willingness to proceed at the scheduled hearing in Louisiana.

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[1]C.F.R. § 3.20 (1994) provides that the IJ "may change venue only upon motion by one of the parties."

Furthermore, Gandarillas was not denied the right to counsel or the right to present witnesses and evidence by holding the hearing in Louisiana. Although an alien does not have a sixth amendment right to representation in a deportation proceeding, *Committee of Cent. Am. Refugees v. INS*, 795 F.2d 1434, 1439 (9th Cir. 1986), he does have a statutory "privilege of legal representation at a deportation hearing at no expense to the government." *Delgado-Corea v. INS*, 804 F.2d 261, 262 (4th Cir. 1986) (citing INA § 242(b), 8 U.S.C. § 1252(b)). However, he does not have the right to be detained where his ability to obtain representation is the greatest. *Sasso*, 735 F. Supp. at 1049 (citing *Committee of Cent. Am. Refugees*, 795 F.2d at 1437).

The IJ did all that was necessary to safeguard Gandarillas's statutory right to counsel when the IJ advised him of that right, gave him a list of free and inexpensive legal services in the area, and postponed the hearing to allow him time to secure representation. *Delgado-Corea*, 804 F.2d at 262; AR at 138-39. Gandarillas waived that right by appearing without counsel when the hearing resumed and stating that he would prefer to represent himself rather than take more time to seek counsel. Moreover, he never claimed that the transfer had disrupted his relationship with counsel previously retained elsewhere nor did he present any support for his bald allegations that counsel was unavailable to him in Louisiana. On this record, it could not be held that holding the hearing in Louisiana effectively denied Gandarillas's right to counsel. *See Committee of Cent. Am. Refugees*, 795 F.2d at 1439-40.

Nor was his right to present witnesses and evidence violated by the transfer to and hearing in Louisiana. He had the same legal right to present witnesses and evidence in Louisiana that he would have had anywhere, and he has not demonstrated any practical prejudice to that right resulting from the hear-

ing's location. He did in fact present evidence in the form of letters and documents. And he has failed to specify what additional evidence or witnesses he would have presented had the hearing taken place elsewhere, or why affidavits of those witnesses would have been insufficient. This lack of specificity is fatal to Gandarillas's claim; we could not determine whether the place of hearing violated his right to present evidence and witnesses without any record indication of the nature of evidence otherwise available to him and its potential importance to his claim. *See Maldonado-Perez v. INS*, 865 F.2d 328, 334-36 (D.C. Cir. 1989) (holding that alien must name specific witnesses in order to prevail on change of venue motion); *cf. Baires v. INS*, 856 F.2d 89, 92-93 (9th Cir. 1988) (holding that IJ abused discretion in refusing to change venue to city where alien had already retained counsel and where counsel had located three witnesses willing to testify).

Second, the IJ's questioning during the hearing did not violate Gandarillas's right to due process. The IJ has authority in a deportation hearing to examine and cross-examine witnesses, including the deportee himself. INA § 242(b), 8 U.S.C. § 1252(b). While it might have been preferable for the IJ to limit himself to eliciting positive information of the type that counsel for Gandarillas might have elicited and to refrain from eliciting negative information so long as the U.S. Attorney was present to fulfill that function, we could not conclude that the IJ's questioning rose to the level of violating Gandarillas's statutory or constitutional rights. The IJ's questioning did not deprive Gandarillas of a fair and meaningful hearing — it was the most orderly means by which any mitigating information could be presented; it did not elicit false admissions; and Gandarillas had sufficient opportunity to add other information not elicited by the judge.

Third, Gandarillas was not prejudiced by the lack of a Spanish translator at his hearings. Gandarillas argues that it

is "self-evident" that his English was too poor for the hearing to be conducted without a translator present. It is true that an alien who does not understand English has the right to the services of a translator at his deportation hearing in order to effectuate his right to present evidence and cross-examine witnesses. *Drobny v. INS*, 947 F.2d 241, 244 (7th Cir. 1991); *Tejeda-Mata v. INS*, 626 F.2d 721, 726 (9th Cir. 1980), *cert. denied*, 456 U.S. 994 (1982). However, in the present case, the IJ confirmed several times that Gandarillas understood English. Furthermore, his answers were intelligible and responsive to the IJ's questions. Thus, the IJ's conclusion that Gandarillas's command of the English language was adequate to ensure a fair and meaningful hearing is amply supported by the record, and we could find no violation of statutory or constitutional right in the failure to provide a translator.

Fourth, Gandarillas was not prejudiced by being made to appear at his hearings in prison clothing. He was wearing such clothes because he was being detained in relation to his deportation hearing, not pursuant to any conviction. The IJ knew this and had no reason to infer otherwise. In addition, there was nothing formally irregular about the procedure; INA regulations even authorize deportation proceedings to be conducted inside correctional facilities in certain instances. INA § 242a, 8 U.S.C. § 1252(a). There is no evidence that Gandarillas's wearing prison clothing increased the IJ's consciousness of his criminal history or affected his judgment. We therfore could not find any violation of constitutional right in this aspect of the process.

IV.

Gandarillas's challenge to the ultimate discretionary decision to deny him waiver of deportation rests on the contention that the IJ did not properly weigh all the relevant factors

in reaching that decision, and thereby abused his discretion. We disagree.

The BIA has set forth factors which should be considered during the decision whether to grant section 212(c) relief. The positive factors include:

> family ties within the United States, residence of long duration in this country (particularly when the inception of residence occurred while the [applicant] was of young age), evidence of hardship to the [applicant] and family if deportation occurs, service in this country's Armed Forces, a history of employment, the existence of property or business ties, rehabilitation if a criminal record exists, and other evidence attesting to [an applicant's] good character (e.g., affidavits from family, friends, and responsible community representatives).

Casalena, 984 F.2d at 1207 (quoting *Matter of Marin*, 16 I&N Dec. 584 (BIA 1978)) (alteration in original).

Contrary to Gandarillas's allegations, the IJ did consider each of these factors.[2] He solicited information respecting each; found that most of the factors did exist; and treated them as positive equities weighing in favor of section 212(c) relief. Specifically, the IJ found that Gandarillas had family ties in the United States (a mother and six siblings), that he had no family ties in Bolivia, that he had lived in the United States for twelve years since he was fifteen (the positive effect of which was diminished by his ten month return to Bolivia in 1986), that

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[2]We note that the IJ need not have done so explicitly so long as he announced his "decision in terms sufficient to enable a reviewing court to perceive that" he has thoughtfully considered the evidence. *Casalena*, 984 F.2d at 107 (quoting *Becerra-Jimenez v. INS*, 829 F.2d 996, 1000 (10th Cir. 1987)).

he and his family would experience emotional hardship if he was deported, that he might experience financial hardship if he was deported, that he had an extensive history of employment in the United States (interrupted by alcohol problems and incarceration), that he was a part owner of property in the United States, and that he had tried to rehabilitate himself through the alcohol rehabilitation and vocational programs. In addition, the IJ received and considered the documents and letters submitted on behalf of Gandarillas. On the down side, he observed that Gandarillas had not served in the U.S. military and that his mother would not suffer financially due to his deportation because she had other children to support her. Thus, the IJ considered each of the suggested positive factors and found all present except one.

Gandarillas argues in particular that the IJ erred in failing to find one factor: his rehabilitation. Although not necessarily dispositive, demonstrated rehabilitation is an important factor in the determination whether an alien with a criminal record should be granted section 212(c) relief from deportation. *Hazard v. INS*, 951 F.2d 435, 439 (1st Cir. 1991) (citing *Matter of Edwards*, Int. Dec. 3134 (BIA 1990); *Matter of Buscemi*, Int. Dec. 3058 (BIA 1988)).The Seventh Circuit has attempted to identify the factors that should be considered in the determination of whether an alien is rehabilitated.

> In this context, "rehabilitation" has two focuses. One is the restoration of an individual to a drug [or alcohol] free way of life. The other is more general, reformation or restoration to a way of life where future criminal conduct is unlikely. In both of these areas, achievement of rehabilitation is scarcely a readily determinable fact in the ordinary sense and the Board necessarily makes a judgment call, involving an estimate or prediction of an individual's future

> conduct. To make this prediction, the Board has taken into consideration evidence of the nature and seriousness of the crime, repeat offenses, an applicant's remorse and admission of guilt, enrollment in a drug-treatment program or other indicia that an applicant is no longer addicted to drugs, and an applicant's candor in answering questions at the deportation hearing — that is, his credibility.

Palacios-Torres v. INS, 995 F.2d 96, 99-100 (7th Cir. 1993) (footnote omitted). We adopt the Seventh Circuit's approach.

The IJ appears to have applied the above definition in the present case, whether consciously or not, and found that Gandarillas was lacking at least some of the indicia of genuine rehabilitation. For instance, he found that Gandarillas committed criminal offenses over the course of nine years and that he repeatedly violated the terms of his probation, committing various crimes while on probation for others. In addition, he was expelled from one alcohol abuse program because of an inability to refrain from drinking before eventually completing another. Furthermore, he admitted that he had a drinking problem and that he believed that remaining sober would always be a challenge. This cuts both ways: it shows candor, but indicates potential to revert to his previous pattern of alcohol abuse.

After considering these various factors, the IJ did not find rehabilitation to be completely lacking, but rather that Gandarillas's movements toward rehabilitation were relatively small compared to his failures in that regard. The IJ stated that he "could not find that a positive showing of genuine rehabilitation has been made. . . . [Gandarillas] has had many opportunities following each arrest to rectify his life and he has squandered those opportunities." AR at 26. Because the IJ considered the evidence relevant to the determination

regarding rehabilitation and made a reasoned finding, we cannot conclude that his decision was arbitrary or capricious.

In addition, a finding that rehabilitation as well as the other positive equities, or *Marin* factors, exist does not automatically entitle an alien to section 212(c) relief. The BIA must balance these against any adverse factors weighing against the propriety of granting the requested relief.[3] *Casalena*, 984 F.2d at 107. Furthermore, when an alien has a record of serious criminal activity, he must demonstrate "unusual or outstanding equities" in order to be eligible for a favorable exercise of discretion under section 212(c). *Casalena*, 984 F.2d at 107; *Ayala-Chavez v. INS*, 944 F.2d 638, 641 (9th Cir. 1991); *Matter of Edwards*, Int. Dec. 3134, at 7 (BIA 1990); *Matter of Buscemi*, 19 I&N Dec. 628, 633-34 (BIA 1988). We could not conclude that the IJ erred in finding that a rcord of approximately fifteen convictions over nine years is a "record of serious criminal activity." In *Matter of Edwards*, the BIA found that an alien's pattern of criminal misconduct over 10 years was serious enough to require a showing of unusual or outstanding equities before relief was appropriately granted. *Id.* at 9. *See also Akinyemi v. INS*, 969 F.2d 285, 288-89 (9th Cir. 1992) (one conviction for conspiracy and importing and possessing heroin was serious, even though it only involved one transaction and warranted only a five year sentence). In light of the precedent, the IJ's decision here to require Gandarillas to show unusual or outstanding equities was not arbitrary or capricious.

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[3]The adverse *Marin* factors are: "the nature and underlying circumstances of the exclusion ground at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record and, if so, its nature, recency, and seriousness, and the presence of other evidence indicative of [an applicant's] bad character or undesirability as a permanent resident of this country." *Casalena*, 984 F.2d at 107 n.4 (quoting *Marin* at 584 (alteration in original)).

The IJ adequately considered all the *Marin* factors, then noted that the positive equities displayed by Gandarillas were not much different than the hardships to be suffered by any deportee and his family, and that therefore they did "not rise to the level of outstanding or unusual." AR at 25-26.[4] The IJ here did not fail to consider the evidence in Gandarillas's favor; rather he considered the evidence and found it uncompelling in light of his criminal history and pattern of alcohol abuse. Thus, the balancing of equities and ultimate conclusion reached by the IJ was not arbitrary or capricious.

For the foregoing reasons, the order of deportation is

AFFIRMED.

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[4]Even if the positive equities were outstanding, this decision would still withstand scrutiny. "A showing of outstanding equities does not compel relief; in exercising its discretion, the BIA may determine that the seriousness of the offense and other negative factors outweigh even unusual or outstanding equities." *Akinyemi*, 969 F.2d at 288, *quoted in Casalena*, 984 F.2d at 107 n.6.

APPENDIX B

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A35 381 803 — Oakdale Date: Jan - 6 1994

In re: NELSON GANDARILLAS-ZAMBRANA a.k.a. Nalson Gandarillos a.k.a. Oscar J. Gandarillas

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Pro se

ON BEHALF OF SERVICE: Lorraine L. Griffin
General Attorney

APPLICATION: Waiver under section 212(c) of the Act

ORDER:

PER CURIAM. The appeal is dismissed. We have reviewed the record of proceedings, the immigration judge's decision, and the respondent's contentions on appeal. As we find that the immigration judge adequately and correctly addressed the issues raised on appeal, his decision is affirmed based upon and for the reasons set forth in that decision.

/s/ Mary Maquin Dunne
FOR THE BOARD

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APPENDIX C

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE IMMIGRATION JUDGE
Oakdale, Louisiana

October 25, 1993

IN DEPORTATION PROCEEDINGS

File No.: A 35 381 803

In the Matter of

NELSON GANDARILLAS-ZAMBRANA, a.k.a. NALSON GANDARILLAS a.k.a. OSCAR J. GANDARILLAS

Respondent

CHARGE:	Section 241(a)(2)(A)(ii) of the Immigration and Nationality Act; an alien convicted of two crimes involving moral turpitude not arising out a single scheme of criminal misconduct
APPLICATIONS:	Waiver under Section 212(c) of the Immigration and Nationality Act

ON BEHALF OF RESPONDENT: Pro Se

ON BEHALF OF SERVICE: Joyce L. Richard
General Attorney, INS
Oakdale, LA

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a male native and citizen of Bolivia who entered the United States through Washington, D.C. on September 14, 1981. At that time, he was admitted to the

United States as an immigrant. On November 9, 1988, he was convicted in the State of Virginia for the offense of petty larceny. On April 25, 1991, he was convicted in the same state of the same offense.

At a hearing on the issue of deportability, conducted on June 21, 1993, the respondent admitted all of the allegations of fact contained in the Order to Show Cause and was found to be deportable as charged. As relief from deportation, he applied for a waiver under Section 212(c) of the Act.

The application for relief was not timely filed and an order for his deportation was entered. However, on appeal, the Board of Immigration Appeals found that the respondent had made a good faith effort to comply with the orders of the Court and remanded the matter for hearing on the application for relief.

The hearing on the application for relief was conducted on October 25, 1993. At that hearing, the respondent testified that he is single and has no children. His father is deceased and his mother lives in Virginia along with one of his brothers and two of his sisters. He also has three brothers who live in the United States but not with his mother. The respondent testified that he has no family in Bolivia.

The respondent testified that he entered the United States on September 14, 1981. He was then 15 years old. He said he left the United States in 1986 for ten months. During that time, he served in the army of Bolivia.

The respondent testified that no one in the United States is financially dependent upon him. Later in the hearing, he described an injury sustained by his mother to her back which, although not completely crippling, has severely limited her ability to care for herself and caused her to cease work.

The respondent described his employment history as set forth in the written application for relief. In addition to the jobs listed in the application, the respondent said he also worked part time with some of this brothers in the construction trade. He said he was unemployed for four or five months due to his alcoholism discussed below.

The respondent testified that he has not served in the armed forces of the United States. He does own an interest in the house where his mother lives. He said he put up $8,000.00 and his mother and other siblings also put up money and together they bought a residence for $175,000.00. The respondent believes its present value is $200,000.00.

The respondent testified that he had a drinking problem. He said he began drinking at the age of 16 and that most of his criminal offenses were alcohol related. While incarcerated, he participated in several programs for alcoholics. On one occasion, he had a relapse only one month into a three month program and was expelled from the program. During his last period of incarceration, which lasted eight months, he completed several programs as evidenced by group Exhibit Number 10.

The respondent also discussed his criminal record. He said that Exhibit Number 4 accurately reflects his criminal history.

On cross-examination by counsel for the Service, the respondent testified that his mother is 50 years old and was always employed up until her injury. He said that since her injury, his siblings have assisted his mother.

The two convictions alleged in the Order to Show Cause are not so severe that they would require a showing of heightened equities. The respondent's total criminal history, however, represents a series of criminal acts which together constitute a serious adverse factor in the exercise of discretion

which may be overcome, if at all, only by a showing of outstanding or unusual equities.

The respondent has demonstrated family ties in the United States in the form of his mother and six siblings. In light of the fact that he has no family in Bolivia, this is a substantial equity.

The respondent has resided in the United States for twelve years. He was only 15 years old at entry. However, this equity is diminished somewhat by the fact that the respondent has served ten months in the army of his native country only 7 years ago.

If he is deported, both the respondent and his family will suffer emotional hardship. This would not be beyond the hardship to be suffered by any deportee or his family. The respondent's mother has the financial support of her other six children available to her. The respondent himself may suffer economically for he alleges that the economy of Bolivia is poor. However, there has been no evidence introduced to verify this allegation.

Consdiering the responent's long criminal history, a showing of rehabilitation is an important factor in his case. While it is to his credit that he participated in programs on alcohol abuse during his last incarceration, I note his previous failure when he was expelled from a similar program. I note also the number of times that he violated the terms of probation by convictions for additional criminal acts. Therefore, I cannot find that a positive showing of genuine rehabilitation has been made. Both the respondent and the authors of many of the documents attached to his application have asked that he be given a second chance. However, an Immigration Judge has no authority to grant a conditional waiver under Section 212(c) of the Act. The respondent has had many opportunities following each arrest to rectify his life and he has squandered those opportunities.

The positive equities displayed by the respondent do not rise to the level or outstanding or unusual so as to outweigh the serious adverse factors of his long criminal record and long history of alcohol abuse.

ORDER

IT IS ORDERED that the respondent's application for a waiver under Section 212(c) of the Act be denied.

FURTHER ORDER

IT IS FURTHER ORDERED that the respondent be deported from the United States to Bolivia on the charge contained in the Order to Show Cause.

/s/Charles A. Wiegand, III

CHARLES A. WIEGAND III
Immigration Judge

October 25, 1993

APPENDIX D

U.S. Department of Justice
Immigration and Naturalization Service
Order to Show Cause and Notice of Hearing

ORDER TO SHOW CAUSE AND NOTICE OF HEARING
(ORDEN DE PRESENTAR MOTIVOS JUSTIFICANTES Y AVISO DE AUDIENCIA)

In Deportation Proceedings under section 242 of the Immigration and Nationality Act.
(En los trámites de deportación a tenor de la sección 242 de la Ley de Inmigración y Nacionalidad.)

United States of America:
(Estados Unidos de América:)

File No. A35 381 803
(No. de registro)
Dated March 29, 1993
(Fechada)

In the matter of
(en el asunto de)
Nelson GANDARILLAS-ZAMBRANA (Respondent)
Aka: Nalson GANDARILLOS; (Demandado)
Oscar J. GANDARILLAS
Address (*Dirección)* Lorton Youth Center, P.O. Box 98
Lorton, Virginia 22199
Telephone No. (Area Code) (703) 643-6748
(No. de teléfono y código de área)

Upon inquiry conducted by the Immigration and Naturalization Service, it is alleged that:
(Según las indagaciones realizadas por el Servicio de Inmigración y Naturalización, se alega que:)

1) You are not a citizen or national of the United States;
(Ud. no es ciudadano o nacional de los Estados Unidos)

2) You are a native of Bolivia and a citizen of Bolivia
(Yd. es nativo de) *(y ciudadano de)*

3) You entered the United States at or near Washington, D.C.
(Ud. entró a los Estados Unidso en o cerca de)
on or about September 14, 1981
(el día o hacia esa fecha)

4. At that time you entered as a lawfully admitted permanent resident;
(En ese momento, Ud. entró como un legalmente admitió resident permanente)

5. You were, on November 9, 1998, convicted in the General District Court of Arlington County, Virginia for the offense of Petit Larceny, in violation of Section 18.2-96, Code of Virginia)

(Ud. resultó convicto el 9 de noviembre de 1988, en el Distrito Tribunal General del Condado de Arlington, Virginia por el delito de Latrocinio de Menor en violación de Sección 18.2-96, Codigo de Virginia)

6. You were, on April 25, 1991, convicted in the General District Court of Arlington County, Virginia for the offense of Petit Larceny, in violation of Section 18.2-96, Code of Virginia;

(Ud. resultó convicto el 25 de abril de 1991, en el Distrito Tribunal General del Condado de Arlington, Virginia por el delito de Latrocinio de Menor en violación de Sección 18.2-96, Codigo de Virginia)

"SEE ATTACHMENT PAGE SIX FOR ADDITIONAL ALLEGATIONS"
(VEA PAGINA SEIS ADJUNTA CON ALEGATOS ADICIONALES)

Dated March 29, 1993
(Fechada)

File No. A35 381 803
(No. de registro)

Respondent Nalson GANDARILLAS-ZAMBRANA
(Demandado) Aka: Nelson GANDARILLOS;
Oscar J. GANDARILLAS

AND on the basis of the foregoing allegations, it is charged that you are subject to deportation pursuant to the following provision(s) of law:

(Y según los alegatos anteriores, se le acusa de estar sujeto a deportación de acuerdo con la(s) siguiente(s) disposicion(es) de la ley:)

Section 241(a)(2)(A)(ii) of the Immigration and Nationality Act (Act), as amended, in that, at any time after entry, you have be convicted of two crimes involving moral turpitude not arising out of a single scheme of criminal misconduct.

(Sección 241(a)(2)(A)(ii) de la Ley de Inmigración y Nacionalidad (INA), según enmendada, en que, en algún momento después de su entrada, Ud. ha resultado convicto de dos delitos referentes a bajeza moral qu no provienen de un mismo esquema sencillo de conducta delictiva.)

WHEREFORE, YOU ARE ORDERED to appear for a hearing before an Immigration Judge of the Executive Office for Immigration Review of the United States Department of Justice at:

***(POR LO CUAL, SE LE ORDENA** comparecer ante un juez de inmigración de la Oficina Ejecutiva de Revisión de Inmigración del Departmento de Justicia de los Estados Unidos en:)*

Address 901 North Stuart Street, Suite 708,
(Dirección) Arlington, Virginia 22203

On to be determined *(Fecha)* At _____ .m. *(Hora)*

and show cause why you should not be deported from the United States on the charge(s) set forth above.

(y mostrar motivos justificantes por cual no deberia ser deportado de los Estados Unidos por los cargos expresados anteriormente.)

Dated March 29, 1993
(Fechada)

Signature of Issuing Officer /s/William K. Gilligan
(Firma del funcionario que la expide)

Title of Issuing Officer *(Titulo del funcionario que le expide)* William K. Gilligan
Assistant District Director
Detention and Deportation

City and State of Issuance Washington, D.C.
(Ciudad y Estado donde se expide)

(EX#1
Rec'd 6/8/93
CW)